

ESTTA Tracking number: **ESTTA402764**

Filing date: **04/08/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91122524
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Attachments	MOT TO RESUME Exhibit No. 9.pdf (23 pages)(87494 bytes) MOT TO RESUME Exhibit No. 10.pdf (6 pages)(243228 bytes) MOT TO RESUME Exhibit No. 11.pdf (4 pages)(123293 bytes)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,
a Delaware corporation,

Plaintiff/Counterclaim-Defendant,

vs.

NOVELL, INC.,
a Delaware corporation,

Defendant/Counterclaim-Plaintiff.

**MEMORANDUM IN OPPOSITION TO
NOVELL'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON SCO'S NON-
COMPETE CLAIM IN ITS SECOND
CLAIM FOR BREACH OF CONTRACT
AND FIFTH CLAIM FOR UNFAIR
COMPETITION**

Civil No.: 2:04CV00139

Judge Dale A. Kimball
Magistrate Brooke C. Wells

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Plaintiff, The SCO Group, Inc. (“SCO”), respectfully submits this memorandum in opposition to Novell’s Motion for Partial Summary Judgment on SCO’s Non-Compete Claim in its Second Claim for Breach of Contract and Fifth Claim for Unfair Competition.

PRELIMINARY STATEMENT

Novell’s motion ignores key contractual language, the holdings of the very cases it cites, and the testimony of its own representatives who negotiated and signed the Asset Purchase Agreement (“APA”) and Technology License Agreement (“TLA”) on Novell’s behalf. For example, although Novell devotes more than ten pages to proving the undisputed fact that a change in the control of Santa Cruz occurred in 2001, Novell makes only a passing footnote mention of the key fact – there was a two year limit on the change of control restriction on which Novell relies. The 2001 change occurred well outside the two-year period. Novell also fails to mention that the provision at issue only applies if control passes to a company on a specific list, and that SCO is not on that list.

While the plain contractual language is so compelling that each of Novell’s arguments can and should be rejected as a matter of law, the extrinsic evidence is even more conclusive, particularly the testimony of (1) Novell’s own former Chairman of the Board, who signed the APA on Novell’s behalf, (2) the person who was Novell’s chief negotiator of the APA and the TLA, and (3) the person who signed the TLA on Novell’s behalf. All three of these individuals have testified unequivocally that Novell’s proposed interpretation of the APA and TLA is contrary to the intent of the contracting parties. Chairman Frankenberg candidly admitted that Novell breached the TLA by acquiring SuSE Linux (with \$50 million of IBM funding) and distributing SuSE Linux:

Q. (By Mr. Singer) With respect to the noncompete provision which you were asked about, and I think the question was stated in terms of Novell not going into the UNIX business, so I want to make clear in your understanding in distributing Linux, is Novell or its subsidiaries going into the UNIX business in violation of those divisions [sic]?

MR. JACOBS: Objection, calls for a legal conclusion.

A. I'm not a lawyer, but yes.

(Declaration of Mark F. James (5/18/07 James Decl.) Ex. 7 at 157-58.)

STATEMENT OF FACTS

Promise Not to Use Such Technology in Competition With SCO

1. Novell, Inc. and SCO were parties to an Asset Purchase Agreement entered into as of September 19, 1995. (5/18/07 James Decl. Ex. 1.)
2. Prior to entering into the APA, Novell was engaged in the UNIX and UnixWare business. (5/18/07 James Decl. Ex. 1.)
3. SCO was a leader in UNIX System servers. (5/18/07 James Decl. Ex. 8.)
4. The day after Novell and SCO entered into the APA, a press release was issued entitled "SCO ACQUIRES THE UNIX BUSINESS FROM NOVELL AND LICENSES NETWARE TECHNOLOGY." (5/18/07 James Decl. Ex. 8.)
5. At the time of the execution of the APA, Novell was a leading networking software company. Because it had developed its flagship networking product, NetWare, to work on the UNIX operating system, Novell needed and requested the right to distribute trivial portions of the UNIX source code embedded in NetWare. (See 5/18/07 James Decl. Ex. 13 at 226-27.)

6. Accordingly, with the sole intent of accommodating these requests by Novell, the parties to the APA agreed that Santa Cruz would license back to Novell “all the technology included in the Assets” transferred by the APA, as well as “all derivatives of the technology included in the Assets” (collectively, “the Licensed Technology”), subject to certain broad limitations. (5/18/07 James Decl. Ex. 1 § 1.6.)

7. To protect the value to Santa Cruz of the transferred UNIX and UnixWare assets, the APA and TLA each contained a non-compete provision, whereby Novell covenanted not to use the Licensed Technology to compete with SCO’s core operating-system products. (5/18/07 James Decl. Ex. 1 § 1.6, Ex. 4 § II.A.(2).)

8. Section 1.6 of the APA provides in part:

Seller agrees that it shall use the Licensed Technology only (i) for internal purposes without restriction or (ii) for resale in bundled or integrated products sold by Seller which are not directly competitive with the core products of Buyer and in which the Licensed Technology does not constitute a primary portion of the value of the total bundled or integrated product.

(5/18/07 James Decl. Ex. 1 § 1.6.)

9. The TLA implements the agreement between SCO and Novell described in Section 1.6 of the APA and states, under Section II.A.(2), that Novell is permitted to distribute and sublicense “such Licensed Technology and modifications thereof,” provided that

(i) such technology and modifications may be sublicensed and/or distributed by NOVELL solely as part of a bundled or integrated offering (“Composite Offering”); (ii) such Composite Offering shall not be directly competitive with core application server offerings of SCO, and (iii) the Licensed Technology shall not constitute a primary portion of the value of such Composite Offering.

(5/18/07 James Decl. Ex. 4 § II.A.(2).)

10. The “core products” and “core application server offerings” referenced in the APA and TLA, respectively, refer to the UNIX and UnixWare operating systems owned by Santa Cruz upon the closing date. Even before acquiring the UNIX source code, Santa Cruz had been primarily involved in the business of distributing UNIX in binary form, so that with the acquisition of the UNIX and UnixWare source code and copyrights, the UNIX and UnixWare operating systems undoubtedly represented Santa Cruz’s “core products.” In addition, as of the closing date, Santa Cruz had no “application server offering” other than UNIX and UnixWare operating systems. (5/18/07 James Decl. Ex. 13 at 226-27.)

11. After the execution of the APA, Novell continued its business of developing and marketing its NetWare operating system, as it had contemplated in entering into the APA. (5/18/07 James Decl. Ex. 78 at 59).

The APA and TLA Define the Rights Transferred in a Single Transaction

12. The APA and TLA refer to each other as part of the same transaction, as follows:
- The APA calls for the execution of “a license agreement” and the terms thereof regarding the “Licensed Technology” addressed in the TLA. (5/18/07 James Decl. Ex. 1 § 1.6.)
 - The TLA provides that its effective date is “the Closing Date of the Asset Purchase Agreement.” (5/18/07 James Decl. Ex. 4 at 1.)
 - The first “Whereas” clause of the TLA provides that “pursuant to the Asset Purchase Agreement, NOVELL shall be entitled to retain and to exercise, after the Closing Date, certain licenses for Licensed Technology, including related documentation and support.” (5/18/07 James Decl. Ex. 4 at 1.)

intended to implement the directives set forth in Section 1.6 of the APA in the TLA. I did not possess any contrary intent, and I do not recall anyone on either side of the contracts saying or suggesting that anyone possessed any contrary intent.

(5/18/07 James Decl. Ex. 68 ¶ 3.)

17. This view is similarly confirmed by Novell's signatory to the TLA, R. Duff

Thompson:

I describe my education, work history, and involvement with the APA and TLA in my previous Declaration, which I incorporate and adopt here. In the negotiations and discussions of the APA, the parties specifically contemplated and discussed the license agreement that became the TLA. Section 1.6 of the APA reflects Novell's intent to enter into a license agreement with Santa Cruz after the execution of the APA in which Novell would obtain a license to the "Licensed Technology" within the meaning attributed to that term in the APA.

I recall from the negotiations and discussions of the APA that Novell wanted to be free of the terms of the license agreement in the event that Santa Cruz entered into certain types of transactions with certain large companies in the same market or markets as Novell within a certain period of time after the closing of the deal. It is Section 1.6 of the APA that reflects Novell's intent to obtain an "unlimited" license to the Licensed Technology upon the occurrence of a Change of Control as described in Section 6.3(c) of the APA.

(5/18/07 James Decl. Ex. 69 ¶¶ 2-3.)

The APA and TLA Non-Compete Provisions Were Intended to Protect Value of SCO's Newly-Acquired Worldwide UNIX Business and Goodwill

18. SCO and Novell intended the non-compete provisions of the APA and TLA to protect the value of the business SCO obtained from Novell under the APA, as Mr. Thompson, who signed the TLA on behalf of Novell, explained to Alok Mohan, Santa Cruz's signatory:

...we're not going to be going into that business of trying to sell a competitor to UnixWare. That is not our business. That is not our

intent. We are selling the business not for the purpose of going into competition with them. We are selling them the business so they can go take that business and make it grow.

.....

So it just didn't make sense for Novell, and we in the negotiations assured – and I think this is the part that I have fairly clear recollection of, that we assured Alok and his team that it is not Novell's intent to simply come in after the fact and jump back on top of this market on top of you. So that's the way I would get to the question of noncompetition. It was really that it was an assurance that we gave them that wasn't our intent to simply jump back on top of them.

.... SCO was saying, well, okay. We'll give you the license, but there are some restrictions. And those restrictions seemed reasonable at the time, and we agreed to them.

(5/18/07 James Decl. Ex. 11 at 94-95.)

19. Novell's CEO at the time of the execution of the APA and TLA confirmed this intent, testifying that it was his "understanding was that we would not go into the UNIX business and compete with SCO." (5/18/07 James Decl. Ex. 7 at 118.) He confirmed that as long as Novell "didn't go into the UNIX business," Novell "could compete with SCO." (Id.) Mr. Frankenberg testified that "my recollection is that SCO was very concerned about Novell entering – being able to enter the business and compete with SCO using what we got out of the license and also being able at some point in the future to sell that to other people to compete with them. And we said, no, that is not our intent. We're not going to do that." (Id. at 174.)

20. In his deposition, Mr. Frankenberg admitted that Novell breached the TLA by distributing SuSE Linux:

Q. (By Mr. Singer) With respect to the noncompete provision which you were asked about, and I think the question was stated in terms of Novell not going into the UNIX business, so I want to make clear in your understanding in distributing Linux, is Novell

or its subsidiaries going into the UNIX business in violation of those divisions [sic]?

MR. JACOBS: Objection, calls for a legal conclusion.

A. I'm not a lawyer, but yes.

....

MR. JACOBS: Now, you said in response to Mr. Singer's question that you thought that Novell was in violation of the TLA by distributing Linux. What did you base that on?

A. I remember that provision very well because it was a significant concession to SCO to allay their concern about us coming back around and competing with them in the marketplace. And we had no intention of being in the UNIX business or businesses directly in competition with SCO, and that's what -- we memorialized that in that agreement.

Q. And you believe that Linux competes with SCO?

A. It would certainly -- it certainly did compete with SCO's products, yes.

Q. But he asked about present day. Do you believe that Linux competes with SCO today? If you have no opinion on that, fine. I'm just trying to clarify your answers to his questions.

A. Yes, it does, because SCO still sells UNIX-based software.

Q. And the mere fact that Novell distributes Linux, that's all -- and that Linux compete with UNIX, that's all you need to know to know that you're in violation of the TLA?

A. Yes.

(5/18/07 James Decl. Ex. 7 at 157-58, 170-71; see also id. at 56-57 and 116-19.)

21. The absence of any express geographic limitation in the APA reflects the parties' intent and the realities of the business at issue -- namely, that the sales and marketing of the operating systems at issue occurred on a worldwide basis. If Novell were permitted to sell or

market an operating system in violation of the terms of the license restriction where Santa Cruz was to be selling and operating the UNIX and UnixWare operating systems – that is, throughout the world – Novell’s conduct would threaten to undercut Novell’s sale of the UNIX and UnixWare businesses to Santa Cruz. (See 5/18/07 James Decl. Ex. 68 ¶ 4; Ex. 69 ¶ 4.)

22. Because Novell’s use of the UNIX or UnixWare technology transferred to SCO in competition with SCO would have threatened SCO’s market for its products, SCO would not have agreed to license such technology to Novell without a promise from Novell that it would not use such technology in competition with SCO. (See 5/18/07 James Decl. Ex. 13 at 226-27; Ex. 7 at 56-57.)

23. The APA expressly acknowledges “the intent of parties hereto that all of the Business and all of Seller’s backlog, if any, relating to the Business be transferred to Buyer.” (5/18/07 James Decl. Ex. 1 § 1.3(a)(i).) This “Business” was defined as “the business of developing a line of software products currently known as Unix and UnixWare, the sale of binary and source code licenses to various versions of Unix and UnixWare, the support of such products and the sale of other products which are directly related to Unix and UnixWare.” (Id., Recital A.)

24. The APA further states that the parties intended for Novell to sell and for Santa Cruz to acquire “all of Seller’s right, title and interest in and to the assets and properties of Seller relating to the Business” identified on Schedule 1.1(a), excluding the “Excluded Assets in Schedule 1.1(b). (5/18/07 James Decl. Ex. 1 Schedule 1.1(a).) The opening description of the Assets transferred in Schedule 1.1(a), in turn, is extremely broad:

All rights and ownership of UNIX and UnixWare, including but not limited to all versions of UNIX and UnixWare and all copies of

UNIX and UnixWare (including revisions and updates in process), and all technical, design, development, installation, operation and maintenance information concerning UNIX and UnixWare, including source code, source documentation, source listings and annotations, appropriate engineering notebooks, test data and test results, as well as all reference manuals and support materials normally distributed by Seller to end-users and potential end-users in connection with the distribution of UNIX and UnixWare, such assets to include without limitation the following...

(5/18/07 James Decl. Ex. 1 Schedule 1.1(a) § I.)

25. Goodwill is not listed among the “Excluded Assets” in Schedule 1.1(b) of the APA. (5/18/07 James Decl. Ex. 1 Schedule 1.1(b).)

26. The broad transfer of “[a]ll rights and ownership of UNIX and UnixWare” included the goodwill Novell had developed in its UNIX and UnixWare business, as confirmed in a letter dated November 16, 1995, from SCO’s auditor Peat Marwick LLP, who wrote:

Other property being sold includes business documentation such as customer lists, copies of contracts and agreements, employee lists and contracts, human resource materials, operating procedures manuals, accounting records, training materials, marketing materials and collateral, claims against third parties, and other items. The sale includes goodwill, trade names, and other intangibles.

(5/18/07 James Decl. Ex. 70 at SCO1230550 (emphasis added).)

27. The APA further states as follows:

In the event that any provision of this Agreement or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, void, or unenforceable, the remainder of this Agreement will continue in full force and effect and the application of such provision to other persons or circumstances will be interpreted so as reasonably to effect the intent of the parties hereto. The parties further agree to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that will achieve, to the extent possible, the

Novell went into direct competition with SCO only after IBM furnished Novell \$50 million to acquire SuSE and become a distributor of SuSE Linux, which undisputedly competes with SCO's core products. The APA and TLA non-competes have no impact at all on Novell's traditional business.

On this second, independently sufficient basis, Novell's reliance on section 16600 is no basis for the summary judgment Novell seeks.

D. Novell's Sale of Goodwill Under the APA and the Nature of the License Restrictions at Issue Make Those Restrictions Enforceable.

The license restrictions at issue here also satisfy one of the statutory exceptions to section 16600. Section 16601 of the California Business and Professions Code provides in relevant part:

Any person who sells the goodwill of a business . . . or any owner of a business entity that sells . . . all or substantially all of the operating assets of a division . . . of the business entity together with the goodwill of that division . . . may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or that of the business entity [or] division . . . has been carried on, so long as the buyer . . . carries on a like business therein.

Ca. Bus. & Prof. § 16601. For purposes of the section, "business entity" include "any owner of capital stock, in the case of a business entity that is a corporation." Id.

The California courts have repeatedly acknowledged the fundamental nature of the "goodwill" exception to section 16600:

Section 16601's exception serves an important commercial purpose by protecting the value of the business acquired by the buyer. In the case of the sale of the good will of a business it is unfair for the seller to engage in competition which diminishes the value of the asset he sold. Thus, the thrust of section 16601 is to permit the purchaser of a business to protect himself or itself against competition from the seller which competition would have the effect of reducing the value of the property right that was

acquired. One of the primary goals of section 16601 is to protect the buyer's interest in preserving the good will of the acquired corporation.

Strategix, Ltd. v. Infocrossing W., Inc., 142 Cal. App. 4th 1068, 1073 (2006) (citations, quotations, brackets, and ellipsis omitted) (citing cases).

Novell briefly argues otherwise (at 31), but the record and precedent make clear that Novell sold the goodwill in the UNIX and UnixWare businesses under the APA. At the very least, there are factual issues as to whether the goodwill was sold. As an initial matter, "Where a covenant not to compete is executed as an adjunct of sale of a business there is an inference that the business had a 'goodwill' and that it was transferred." Monogram Indus., Inc. v. Sar Indus., Inc., 64 Cal. App. 3d 692, 701 (1977) (citation omitted); accord Harrison v. Cook, 213 Cal. App. 2d 527, 530 (1963) (citing cases); Handyspot Co. of N. Cal. v. Buegeleisen, 128 Cal. App. 2d 191, 195 (1954) (same). On the basis of this inference alone, where on Novell's motion all inferences must be drawn in SCO's favor, Novell's argument that it did not sell goodwill under the APA fails.

In addition, both the language of the APA and the relevant extrinsic evidence confirm that Novell did sell such goodwill. The APA expressly acknowledges "the intent of parties hereto that all of the Business and all of Seller's backlog, if any, relating to the Business be transferred to Buyer." (APA § 1.3(a)(i).) The "Business" is defined as "the business of developing a line of software products currently known as Unix and UnixWare, the sale of binary and source code licenses to various versions of Unix and UnixWare, the support of such products and the sale of other products which are directly related to Unix and UnixWare." (Id., Recital A.) The parties intended for Novell to sell and for Santa Cruz to acquire "all of Seller's

right, title and interest in and to the assets and properties of Seller relating to the Business”

identified on Schedule 1.1(a), excluding the “Excluded Assets in Schedule 1.1(b). (Id. § 1.1(a).)

The opening description of the Assets transferred in Schedule 1.1(a), in turn, is extremely broad:

All rights and ownership of UNIX and UnixWare, including but not limited to all versions of UNIX and UnixWare and all copies of UNIX and UnixWare (including revisions and updates in process), and all technical, design, development, installation, operation and maintenance information concerning UNIX and UnixWare, including source code, source documentation, source listings and annotations, appropriate engineering notebooks, test data and test results, as well as all reference manuals and support materials normally distributed by Seller to end-users and potential end-users in connection with the distribution of UNIX and UnixWare, such assets to include without limitation the following:

(APA, Schedule 1.1(a) § I.) The reference to “all rights and ownership of UNIX and UnixWare” could not be broader, and the reference to what such assets would “include without limitation” cannot reasonably be read to limit the assets to those specifically set forth in the language of the Schedule following the extremely broad opening paragraph.

The appropriate question therefore is not whether Schedule 1.1(a) says “goodwill” – the opening provision could not have been written more broadly – but rather whether Schedule 1.1(b) identifies “goodwill” as an excluded asset. It does not. If there were any doubt, in analyzing and summarizing the transaction in a letter dated November 16, 1995, SCO’s auditor Peat Marwick LLP stated:

Other property being sold includes business documentation such as customer lists, copies of contracts and agreements, employee lists and contracts, human resource materials, operating procedures manuals, accounting records, training materials, marketing materials and collateral, claims against third parties, and other items. The sale includes goodwill, trade names, and other intangibles.

(5/18/07 James Decl. Ex. 70 at SCO1230550) (emphasis added).) The record thus defeats Novell's contention that goodwill was not transferred, and of course precludes any finding in Novell's favor on that issue as a matter of law.⁸

With respect to the next part of section 16601, in turn, the permissible "geographic scope" of a noncompetition covenant is "the area where the sold company carried on business." Strategix, 142 Cal. App. 4th at 1073 (citing cases). The permissible area covered by the covenant need not be synonymous with the area in which the seller enjoyed "goodwill." Monogram, 64 Cal. App. 3d at 701-02. The territory can be "co-extensive with the entire area in which the parties conducted all phases of their business including production, promotional and marketing activities as well as sales." Monogram, 64 Cal. App. 3d at 702 (enforcing agreement not to compete in the United States, Puerto Rico, the Virgin Islands and Canada); see also Kaplan v. Nalpak Corp., 158 Cal. App. 2d 197, 200-01 (1958) (recognizing that the areas where the corporation's business "has been carried on" under section 16601 "are not necessarily limited

⁸ Thus, unlike Hill Medical Corp. v. Wycoff, 86 Cal. App. 4th 895 (2001), which Novell cites (at 28-31) in its discussion of the goodwill exception found in section 16601, the APA and the circumstances surrounding this transaction clearly contemplated the transfer of goodwill. In Hill, because the "amended and restated employment agreement" and "stock redemption agreement" between Hill Medical and Dr. Wycoff did not specifically address payment for goodwill, and because the actual repurchase price of Hill's shares was far below fair market value, the court held that the non-compete agreement was invalid and was not covered by the exception found in § 16601. See id. at 906-07. However, the court emphasized that the full set of circumstances surrounding a transaction must be evaluated. In discussing situations where sellers transfer corporate shares, the court notes:

We can foresee situations in which the parties have not allocated a specific portion of the purchase price to goodwill, and yet the parties recognized that goodwill was part and parcel of the transaction involving a substantial corporate interest. . . . In such situations, the transaction would meet the requirements of section 16601. In analyzing whether parties had intended goodwill to be a part of the consideration in the sale of stock, all aspects of the sales arrangement should be evaluated. For example, the entire structure of the transaction, including the sales price, might suggest that it can be said that goodwill had transferred.

Id. at 904.

respect to the supposed illegality of the relevant provisions of the APA and TLA with respect to SuSE Linux is premature and improper.

CONCLUSION

SCO respectfully submits, for the foregoing reasons, that the Court should deny Novell's Motion for Partial Summary Judgment on SCO's Non-Compete Claim in Its Second Claim for Breach of Contract and Fifth Claim for Unfair Competition.

DATED this 18th day of May, 2007.

HATCH, JAMES & DODGE, P.C.

Brent O. Hatch

Mark F. James

BOIES, SCHILLER & FLEXNER LLP

David Boies

Robert Silver

Stuart H. Singer

Stephen N. Zack

Edward Normand

DORSEY & WHITNEY LLP

Devan V. Padmanabhan

Counsel for The SCO Group, Inc.

By: /s/ Edward Normand

EXHIBIT No. 10

TECHNOLOGY LICENSE AGREEMENT

This Agreement is made between Novell, Inc. ("NOVELL"), a Delaware corporation, and The Santa Cruz Operation, Inc. ("SCO"), a California corporation. The effective date of this Agreement shall be the Closing Date of the Asset Purchase Agreement.

WHEREAS, pursuant to the Asset Purchase Agreement, NOVELL shall be entitled to retain and to exercise, after the Closing Date, certain licenses for Licensed Technology, including related documentation and support.

NOW, THEREFORE, for mutual consideration, the adequacy and sufficiency of which are acknowledged, the parties agrees as follows.

L. DEFINITIONS

For purposes of this Agreement:

"Asset Purchase Agreement" means the September 19, 1995 Asset Purchase Agreement between NOVELL and SCO, as amended by Amendment No. 1 to the Asset Purchase Agreement dated as of December 6, 1995.

"Assigned Vendor Agreement" means an agreement (i) originally entered into by NOVELL, or a predecessor in interest of NOVELL, for the acquisition of software to be incorporated into or bundled with Licensed Technology, and (ii) imposing payment obligations on NOVELL that were assumed by SCO under the Asset Purchase Agreement.

The terms "Assets" "Change of Control", "Closing Date", "Licensed Technology" and "Transitional Contracts" shall have the respective meanings attributed to such terms in the Asset Purchase Agreement.

II. NOVELL'S RETAINED LICENSES

A. Effective upon the Closing Date and in connection with the transfer of the Assets by NOVELL to SCO pursuant to the Asset Purchase Agreement, NOVELL hereby retains, with the consent of SCO and, shall have a non-exclusive, non-terminable, world-wide, fee-free license to

(1) use, reproduce and modify, and authorize its customers to use, reproduce and modify, Licensed Technology (including related documentation) in their respective internal business operations; and

(2) subject to paragraphs B and C of this Section II, to sublicense and distribute, and authorize its customers to sublicense and distribute, such Licensed Technology and modifications thereof, in source and binary form; provided, however, that (i) such technology and modifications may be sublicensed and/or distributed by NOVELL solely as part of a bundled or integrated offering ("Composite Offering"); (ii) such Composite Offering shall not be directly competitive with core application server offerings of SCO, and (iii) the Licensed Technology shall not constitute a primary portion of the value of such Composite Offering. SCO understands and acknowledges that such restrictions on sublicensing and/or distribution shall not affect any rights specifically retained by NOVELL under the Asset Purchase Agreement, including but not limited to rights under Transitional Contracts.

B. In the event of a Change of Control of SCO, and commencing with the effective date of such Change of Control, the proviso in subparagraph IIA(2) setting forth

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restrictions on the sublicense and/or distribution of Licensed Technology and modifications thereof shall cease to exist.

C. In the event of a Change of Control of NOVELL, and commencing with the effective date of such Change of Control, the term "Composite Offering" in the proviso of subparagraph IIA(2) above shall be restricted to bundled and integrated offerings of NOVELL or its customers, as the case may be, that have been developed or substantially developed as of the effective date of such Change of Control.

III. OWNERSHIP

As between NOVELL and SCO:

- (1) Ownership of Licensed Technology shall reside in SCO.
- (2) Ownership of any modifications made to Licensed Technology pursuant to the licenses specified in Section II above shall reside in NOVELL.

IV. REIMBURSEMENT TO SCO FOR CERTAIN PAYMENT OBLIGATIONS

In the event that the exercise of any of NOVELL's licenses specified in Section II above results in an obligation on the part of SCO to remit any payment to a third party under an Assigned Vendor Agreement, NOVELL shall reimburse SCO for the amount of any such payment remitted by SCO to such third party.

V. SUPPORT

With respect to any version or load of the "Eiger" product forming part of the Licensed Technology, SCO shall provide to NOVELL a reasonable degree of support to assist NOVELL's licensing activities pursuant to Section II above.

VI. DISCLAIMER OF WARRANTY

THE PARTIES AGREE THAT LICENSED TECHNOLOGY IS PROVIDED "AS IS". ANY AND ALL WARRANTIES OF ANY KIND WHATSOEVER WITH RESPECT TO LICENSED TECHNOLOGY, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND/OR FITNESS FOR A PARTICULAR PURPOSE, AND WARRANTIES AGAINST INFRINGEMENT OF ANY THIRD PARTY PROPRIETARY RIGHT, ARE EXPRESSLY DISCLAIMED AND EXCLUDED.

VII. ASSIGNMENT

A. Neither party hereto may assign this Agreement or any of its rights hereunder to any other person or entity without the prior written consent of the other party; provided, however, that either party may assign its rights and delegate its obligations under this Agreement to its corporate parent, another subsidiary of such parent, or a third party transferee of substantially the entire portion of such party's business to which this agreement relates.

B. Subject to Paragraph A of this Section, this Agreement shall be binding upon and shall inure to the benefit of the successors and permitted assigns of NOVELL and SCO and is not intended to confer upon any other person any rights or remedies hereunder.

VIII. ENTIRE AGREEMENT

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This Agreement and the Asset Purchase Agreement constitute the entire understanding between the parties with respect to its subject matter, and supersede all prior understandings, both written and oral, between them relating to such subject matter.

IX. NO WAIVER

No waiver, modification or amendment of any provision of this Agreement shall be effective unless made in writing and signed by duly authorized representatives of both parties.

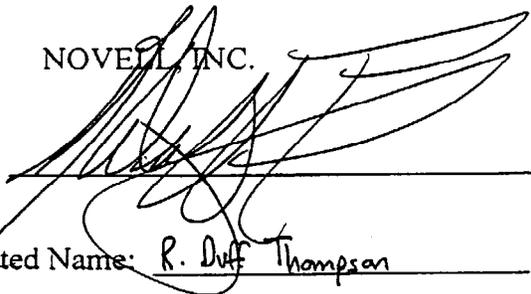
X. GOVERNING LAW

This Agreement shall be governed by, and construed in accordance with, the substantive laws of California.

IN WITNESS WHEREOF, the parties have executed this Agreement through their duly authorized representatives on the respective dates indicated below.

NOVELL, INC.

By:

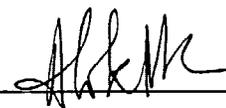

Printed Name: R. Duff Thompson

Title: Senior Vice President - Corporate Development

Date: December 6, 1995

THE SANTA CRUZ OPERATION, INC.

By:


Printed Name: Alok Mohan

Title: Chief Executive Officer

Date: December 6, 1995

EXHIBIT No. 11

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CONFIRMATION AGREEMENT

This Agreement is effective among The Santa Cruz Operation, Inc. ("SCO"), a California corporation; Novell, Inc. ("NOVELL"), a Delaware corporation; and X/Open Company, Limited ("X/OPEN"), a UK corporation. The effective date of this Agreement is the latest of the dates of execution by the respective parties.

WHEREAS, NOVELL and SCO entered into a September 19, 1995 Purchase Agreement, as amended ("APA"), pursuant to which NOVELL agreed to convey its entire right, title and interest in and to the UNIX trademark to SCO, subject to rights and obligations established in a May 14, 1994 NOVELL-X/OPEN Trademark Relicensing Agreement, as amended ("1994 Agreement") with the exception of non-assignable agreements and any compensation received by NOVELL from X/OPEN pursuant to the 1994 Agreement; and

WHEREAS, pursuant to the 1994 Agreement, X/OPEN is entitled to receive, subject to certain conditions not relevant here, full ownership of the UNIX trademark as of May 14, 1997; and

WHEREAS, X/OPEN and SCO desire to provide for the acceleration of the vesting of title in X/OPEN to the UNIX trademark, and the assignment to SCO of NOVELL's rights under the 1994 Agreement, under the following terms and conditions.

NOW, THEREFORE, for appropriate consideration, the adequacy and sufficiency of which are acknowledged, the parties agree as follows:

1. At the request of X/OPEN, NOVELL shall, as soon as possible after the date of execution of this Agreement, execute appropriate assignment document(s), to be prepared by X/OPEN, formally transferring to X/OPEN the legal title to the UNIX trademark. As among NOVELL, SCO and X/OPEN, and notwithstanding any prior understandings to the contrary, NOVELL shall for this purpose be considered the owner of legal title to the UNIX trademark and shall execute such assignment document(s) as assignor. SCO agrees that notwithstanding the fact that NOVELL will be executing such assignment document(s) after the Closing Date established by the APA, such assignment by NOVELL shall not be considered a breach of NOVELL's obligations under the APA. X/OPEN acknowledges and confirms that, as of the date of execution of such assignment document(s) ("Assignment Date"), it will be solely responsible for all expenses and fees incident to the protection and enforcement of the UNIX mark, including but not limited to expenses of seeking, obtaining and preserving registration of same, and the expenses of transferring existing registrations into the name of X/OPEN; provided, however, that

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with respect to any document that is required to be executed by SCO to perfect X/OPEN's title to such mark after such assignment. SCO shall execute such document without cost to X/OPEN.

- 5. This Agreement supersedes all prior agreements, arrangements and understandings among the parties and, together with any relevant portions of the 1994 Agreement that are not inconsistent with this Agreement, constitute the entire understanding among the parties relating to the subject matter of this Agreement. No addition to or modification

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of any provision of this Agreement shall be binding on the parties unless made by a written instrument signed by a duly authorized representative of each of the parties.

IN WITNESS WHEREOF, the parties have executed the Agreement through their duly authorized representatives on the respective dates indicated below.

THE SANTA CRUZ OPERATION, INC.

X/OPEN COMPANY, LIMITED

By: James P. Wilt

By: Steve Norn

Printed Name: James P. Wilt

Printed Name: STEVE NORN

Title: VP Business Development

Title: GENERAL COUNSEL

Date: September 4, 1996

Date: SEPTEMBER 2 1996

NOVELL, INC

By: David R. Bradford

Printed Name: David R. Bradford

Title: Sr. Vice President and General Counsel

Date: August 23, 1996

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